IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	*	CASE NO. 5:15CR446
Plaintiff	*	
-vs-	*	JUDGE DAN A. POLSTER
TERRENCE JOSEPH McNEIL	*	
Defendant	*	MOTION FOR HEARING PURSUANT TO *DAUBERT/KUMHO TIRE*

* * *

Now comes the Defendant, TERRENCE JOSEPH McNEIL, by and through undersigned counsel, who respectfully requests that this Court conduct a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), to determine whether a proposed Government witnesses expert testimony is both relevant and reliable. The Government seeks to admit at trial the testimony of an as yet undisclosed expert witness. It is Mr. McNeil's position that the disclosure to date does not allow for an adequate assessment of the reliability to the proposed testimony. As such Mr. McNeil respectfully requests a hearing.

Respectfully submitted,

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MEMORANDUM

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence and Supreme Court case law interpreting the Rule. To introduce expert testimony, the proponent must first demonstrate that the proffered expert is "…qualified as an expert by knowledge, skill, expertise, training, or education may testify in the form of an opinion or otherwise..." Evidence Rule 702. Next the proponent must satisfy the court that the proffered testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993).

At the pretrial in this matter held on October 18, 2016, the Court inquired as to the length of the trial. The Government responded by describing witnesses, including experts, whom the government might call in this matter. At that time, the government indicated as follows:

> AUSA: Regarding the conduct, Judge; specifically regarding the Islamic state, the theology, and expert to testify about social media platforms.

The attorney went on to note:

> AUSA: It'll be more – it won't be offering opinion testimony, Judge; be more just providing background information about who they are, their use of social medial and what it means and the ideology. I think it's important in terms of establishing the intent in this case.

(R.34, Pre-Trial Transcript, Page ID#222)

In *Daubert, supra*, the U.S. Supreme Court noted that "the Rules of Evidence - - especially Rule 702 - - do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principal will satisfy those demands." *Id*. at p.597. The Court noted that, in accordance with Evidence Rule 702, "[t]he subject of an expert's testimony must be 'scientific….knowledge.' (footnote omitted). The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or supported speculation." *Id*. at 589-90. In *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), the U.S. Supreme Court expanded the *Daubert* holding by finding that Evidence Rule 702 "…..makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony. In *Daubert,* the Court specified that it is the Rules word 'knowledge' not the words (like 'scientific') that modify that word, 'that establishes a standard of evidentiary reliability." (Citation omitted) Hence, as a matter of language, the Rule applies its reliability standard to all 'scientific', 'technical', or 'other specialized' matters within its scope." *Id*. at 147.

In determining the relevant and reliability of proffered expert testimony, the district court "…must determine at the outset, pursuant to Rule 104(a), (footnote omitted) 'whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact an issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert* at 592-93. In this case, the central issue is whether or not McNeil intended that the repostings were to be seen as a threat or a solicitation. The government has suggested that an expert would be needed to establish "…in terms of establishing an intent in this case." (Doc. #24, Pre-Trial Transcript, Page ID#222).

While it is recognized that "[t]he district court is not obligated to hold a *Daubert* hearing, (citation omitted), a district court should not make a *Daubert* determination when the record is not adequate to the task." *Jahn v. Equine Services, PSC,* 233 F.3d 382, 393 (6th Cir. 2000). The government is requesting that an expert testify as to McNeil's intent. Specifically, regarding the Islamic state, the theology, and expert to testify about social media platforms. Specific factors which a district court should consider in its gatekeeping determination include those set forth in *Daubert*, 509 U.S. at 592-94, but as *Kumo Tire* recognized, "[i]n other cases, the relevant reliability concerns may focus upon personal knowledge or experience." *Id*. at 150.

Here there are questions as to whether the expert could be qualified as an expert in the area of the Islamic State and its theology and/or social media platforms. The next question is whether any proffered testimony is reliable. Discovery in this case is massive. It is not entirely clear from what the government has provided as to what information an expert would have reviewed and what his findings and conclusions would be. Similarly, it is not clear as to how any expert would arrive at his findings regarding Mr. McNeil's intent in this case as mentioned in the superseding indictment.

An issue Mr. McNeil intends to raise at a hearing is the form and methodology employed by and expert and what steps that expert went through to extract his conclusions from the available documents that he reviewed. In reviewing the discovery, which consists of an enormous amount of digitally recovered information from Facebook, Twitter and Tumblr, it is not clear whether an expert would be able to inquire into such a manifestly relevant factor as Mr. McNeil's intent merely by examining the documents provided thus far in discovery. A hearing will determine whether an experts opinion satisfy the *Daubert/Kumho Tire* reliability analysis.

Even if the court finds that an expert is qualified and his testimony is reliable, the testimony may not be admitted unless it is also relevant. In U.S. v. Bonds, 12 F.3d 540, 555 (6th Cir.1993), the Court noted that "[t]he 'relevance' requirement stems from Rule 702's requirement that the testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' Thus, there must be a 'fit' between the inquiry in the case and the testimony, and expert testimony that does not relate to any issue in the case is not relevant and therefore not helpful. *Daubert*, 113 S.Ct. at 2795." In is Mr. McNeil's position that nothing an expert would testify to bears on any of the issues in this case. Mr. McNeil is charged with violating 18 U.S.C. § 875(c), Threat, 18 U.S.C. § 373(a), Solicitation and 18 U.S.C. § 119, Threat. Any testimony from an expert is not relevant to any issue in this case. Because there is no relevance to any issue, the court need not even apply Federal Rule of Evidence 403 balancing.

Even assuming arguendo that the expert testimony had slight relevance and met the requirements of Rule 702, it would still not be admissible. Evidence Rule 403 permits relevant evidence to be excluded if it is prejudicial: "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed.R.Evid 403. In *United States v. Geiger*, 303 Fed.Appx. 327, 329 (6th Cir.2008), the Court noted that, "[l]ike all evidence, the admissibility of expert testimony is also subject to a….balancing of probative value against likely prejudice under Rule 403." Almost all of the concerns of Rule 403 apply because the proposed expert testimony would not only create unfair prejudice, but would also confuse the issues, mislead the jury and waste time.

CONCLUSION

For the foregoing reasons Mr. McNeil respectfully requests a *Daubert* hearing to determine prior to trial whether an expert's testimony as set forth by the Government would be both reliable and relevant.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on December 9, 2016, a copy of the foregoing Motion for *Daubert/Kuhmo Tire* Hearing was electronically filed. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

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